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No. 97-147

In the
Supreme Court of the United States
October Term, 1997

ATLANTIC MUTUAL INSURANCE CO. and
Includible Subsidiaries,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

REPLY BRIEF OF PETITIONER

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Respondent's brief ("Res. Br.") concludes that the Petition for Writ of Certiorari herein should be granted. Nevertheless, respondent adds that in view of the arguments contained in his brief, the Court may wish to consider summary affirmance. (Res. Br. at 21, n. 13.) Petitioner

submits that summary affirmance is patently inappropriate in this case.

DISCUSSION

The decision of the Court of Appeals for the Third Circuit in this case directly conflicts with the decision of the United States Tax Court below and the decisions of the Court of Appeals for the Eighth Circuit and the Tax Court in *Western National Mutual Insurance Co. v. Commissioner*, 65 F. 3d 90 (8th Cir. 1995), *aff'g*, 102 T.C. 338 (1994). The Eighth Circuit and the Tax Court each held that section 1.846-3(c)(3) of the Treasury regulations conflicts with the plain meaning of the statute and therefore is invalid. The Tax Court specifically found that the facts here are indistinguishable from those in *Western National*. (Pet. App. A45.)

While agreeing with petitioner that the Third Circuit's decision in this case conflicts with the Eighth Circuit's decision in *Western National* (Res. Br. at 14), respondent seemingly attempts to distinguish *Western National* (Res. Br. at 20) in order to present this case as one for summary affirmance. In this connection, respondent points out that he did not contest the expert testimony that taxpayer introduced in *Western National*, and respondent implies that the Eighth Circuit would have reached a different decision if it had been presented with the record of this case. *Id.* Although there was some differing expert testimony in *Western National* and this case, the Eighth Circuit specifically stated that it would have reached the same decision in *Western National* without regard to expert testimony. 65 F.3d at 93. Moreover, the Tax Court did in fact reach the same decision in this case as it did in

Western National notwithstanding the expert testimony respondent presented in this case. *Atlantic Mutual Insurance Co. v. Commissioner*, 71 T.C.M. (CCH) 2154 (1996), *rev'd*, 111 F.3d 1056 (3d Cir. 1997).

The decisions of the Eighth Circuit and the Tax Court are recent and thoroughly reasoned. The conflict in the approaches used by the Eighth Circuit and the Tax Court on the one hand and the Third Circuit on the other hand plainly deserves more than the summary attention of this Court.

Separately, respondent incorrectly maintains that the Conference Committee's deletion of an ambiguous sentence from the Senate Finance bill clearly signals Congress' intention to redefine the term reserve strengthening as used in the Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085, 2404 (the "Act"), to mean any reserve increase, rather than only those reserve increases caused by changes in assumptions or methodologies consistent with longstanding industry usage. (Res. Br. at 15.) Respondent states:

> In enacting the life insurance provisions, Congress *excluded* ordinary increases in reserves from the operation of the "reserve strengthening" clause. A similar exclusion was contained in the Senate version of Section 1023(e)(3)(B), which was deleted by the Conference Committee. (Res. Br. at 17.)

In fact, what the Conference Committee deleted from the Senate version of section 1023 of the Act was a single sentence that was patterned on a sentence in section 216 of the Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98

Stat. 494,758 ("DEFRA"). As used in DEFRA, the sentence in question pertained *only* to insurance contracts issued in 1983 (and not to the overall reserves held by the insurance company for contracts issued in prior years). The sentence in DEFRA had *no* impact on the *general* definition of reserve strengthening for purposes of that statute. Indeed, that sentence did not even appear in the original version of the reserve strengthening provisions of DEFRA contained in the House Ways and Means bill, yet there was never any question that under the House bill ordinary increases in reserves were excluded from the meaning of reserve strengthening.

As can be seen from even a brief account of the drafting history of section 216 of DEFRA and section 1023 of the Act, respondent's one-sided analysis of the legislative history is misleading. It would be wrong to conclude summarily that Congress intended to give the term reserve strengthening a meaning different from the DEFRA meaning based on the omission from the Act of a single sentence contained in DEFRA that was intended to provide a special rule applicable only to reserves on newly issued insurance contracts during the year the legislation was enacted.

CONCLUSION

The petition for a writ of certiorari should be granted and respondent's suggestion that the Court may wish to consider summary affirmance should be rejected.

Dated: October 1, 1997

Respectfully submitted,

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